APPENDIX A.

Section 2680 (j) of Title 28, Supp. III, United States Code [formerly the Federal Tort Claims Act]:

Section 2680. *Exceptions*

The provisions of this chapter and section 1346 (b) of this title shall not apply to—

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

APPENDIX B.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 10131

Walter B. Stewart, Sinclair Stewart and Donald Stewart, Plaintiffs-Appellants, vs. United States of America, Defendant-Appellee.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. Honorable Michael L. Igoe, Judge Presiding.

DEFENDANT-APPELLEE'S PETITION FOR REHEARING.

MAY IT PLEASE THE COURT:

I.

1. The Court in its opinion holds that the Illinois statute relative to the storage of explosives (Sec. 143, Chap. 93, Smith-Hurd Illinois Annotated Statutes) "is for the purpose of the instant litigation applicable to and binding upon the Federal government". This, it is respectfully submitted, is error.

The Court correctly noted that the Illinois statute was enacted "long subsequent to the cession by the State to the United States of the territory at Fort Sheridan", and

observed that, it was not a part of the body of laws in the ceded area, unless made so by Congressional action. The Court viewed the Federal Act of February 1, 1928 (16 U. S. C. 457) as being such Congressional action and as being applicable to this case. The statute is quoted in the Court's Opinion, but it is set forth again here because of the crucial importance and because its misinterpretation led to the error complained of.

> "§ 457. Action for Death or Personal Injury Within National Park or Other Place Under Jurisdiction of United States; Application of State Laws.
>
> In the case of the death of any person by the neglect or wrongful act of another within a national park or other place subject to the exclusive jurisdiction of the United States, within the exterior boundaries of any State, such right of action shall exist as though the place were under the jurisdiction of the State within whose exterior boundaries such place may be; *and in any action brought to recover on account of injuries sustained in any such place the rights of the parties shall be governed by the laws of the State within the exterior boundaries of which it may be.* Feb. 1, 1928, c. 15, 45 Stat. 54".

The pertinent portions are italicized as in the supplemental memorandum of plaintiffs who urged this view of the statute's applicability upon this Court. Referring now to those portions, a careful reading of which is invited, the question is posed—In what kind of action is the said statute applicable? The glaring answer is "in any action brought to recover on account of injuries *sustained in any such place*" i.e., in a federal reservation described in the statute. Are the instant actions to recover for injuries sustained in a federal reservation? The equally glaring answer is No. The plaintiffs here seek to recover for injuries alleged to have been sustained in the City of Lake Forest, Illinois (Transcript p. 5). It is respectfully sub-

mitted that the plain words of 16 U.S.C. 457 show that it has no applicability to this case. It is added that in the reported cases decided under that statute not one involved an injury sustained outside of a federal reservation such as plaintiffs present here. Plaintiffs and this Court's Opinion rely solely upon this federal statute as a basis for holding that the Illinois explosives statute applies here. The demonstrated inapplicability of 16 U.S.C. 457 to the facts of the case leave no theory before the Court upon which to apply the Illinois statute.

2. The Court in its Opinion held that the negligence of the government was the proximate cause of plaintiffs' injuries.

The Court recognized that the question of proximate causation was the most serious impediment to plaintiffs' right to recover. To clear this difficult barrier the Opinion relies heavily upon *Ostergard* v. *Frisch*, 333 Ill. App. 359 and *Ross* v. *Hartman*, 139 Fed. (2d) 14. In each of these cases the negligence complained of was a violation of a statute or ordinance. If these cases apply the plaintiffs' task is admittedly easier as said in this Court's Opinion (p. 11) quoting from the *Ross* case.

> "If by creating the hazard which the ordinance was intended to avoid, it brings about the harm which the ordinance was intended to prevent, it is a legal cause of the harm."

As stated above, however, this is not a case involving the violation of any applicable statute. The test for proximate causation set forth in those cases cannot, therefore, be used here. This case, stripped of plaintiffs' erroneous claims of statutory violation, fall clearly within the well-defined line of Illinois cases set forth in the Government's Brief and in the Dissenting Opinion of this Court represented by *Anderson* v. *Karstens*, 218 Ill. App. 285, and *Matijevich* v. *Dolese & Shepard Co.*, 261 Ill. App. 493.

It is submitted that this Court's adoption of plaintiffs' mistaken view that this action fell within the provisions of 16 U.S.C. 457 and that the Illinois explosives statute was therefore applicable resulted in the erroneous conclusion that plaintiffs were entitled to a summary judgment.

II.

The Court's Opinion holds that this is an action properly brought under the provisions of the Federal Tort Claims Act (28 U.S.C. 1346). The government here urges the court to note the applicability of 28 U.S.C. 2680(j) to the instant case.

> "The provisions of this chapter and section 1346(b) of this title shall not apply to
>
> (j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war."

The plaintiffs' claim arises out of the maintenance by the Army of a stock of hand grenades at Fort Sheridan. It is admitted by plaintiffs (Trans. p. 6) that the grenades were stored: "As part of necessary functions of Army training and preparedness." The maintenance and supply of weapons of war and the training of men are necessary parts of warfare. They are as much a part of combatant activities as actual armed conflict. Webster's New International Dictionary (2 Ed.) defines "combatant" as follows: "a Mil. Taking part in, or prepared to take part in, active fighting; as a combatant officer, as distinguished from one of the medical, commissariat, or similar branch". Note that the definition includes not only active fighting but also the state or condition of preparedness to take part in actual fighting. It is respectfully submitted that both the dictionary definition of "combatant" and our common knowledge of the factors necessary for, and part of combat

lead to the conclusion that the storage and maintenance of war weapons at an Army fort was a combatant activity within the meaning of 28 U.SC. 2680(j).

If Congress had intended that the words "Combatant Activities" have a narrower meaning such as would exclude activities preparatory to actual shooting less inclusive language could easily have been used. The plaintiffs' claims arising as they do from combatant activities are expressly excluded from the operation of the Tort Claims Act, for it will be judicially noticed, that at the time of the acts complained of the United States was at war. The District Court was therefore without jurisdicition of plaintiffs' action. Their complaint for this reason *inter alia* was properly dismissed.

III.

In its Opinion this Court concludes that the District Court should have allowed Plaintiffs' Motion for Summary Judgment. As stated in the Dissenting Opinion, this in effect "upholds and sustains that part of the Plaintiffs' Appeal which is from the order of the District Court denying Plaintiffs' Motion for Summary Judgment". The authorities gathered in the Dissenting Opinion (p. 11) clearly sustain the position asserted in that opinion that the portion of the District Court's order denying Plaintiffs' Motion for Summary Judgment was interlocutory and not appealable. It is submitted that the Court erred in sustaining that part of the appeal. It is urged that it be dismissed as being not within the appellate jurisdiction of this Court.

Respectfully submitted,

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